Petition

81-1224

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

WILLIAM R. BOLLOW,
Petitioner,

VS.

FEDERAL RESERVE BANK OF SAN FRANCISCO,
BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM, LOUIS E. REILLY,
DOES I through XX, Inclusive,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

WILLIAM R. BOLLOW, *pro se*
1457 Baker Street
San Francisco, CA 94115
(415) 563-8230

QUESTIONS PRESENTED

1. Whether a Federal Reserve Bank's power "to dismiss at pleasure", under 12 U.S.C.A. 341 (Fifth), preempts State process and good faith restraints on employee terminations; and, whether similar National Bank power also preempts such State law?

2. Whether this section of the Federal Reserve Act similarly precludes agency authority to grant such process and tenure rights, even for post-termination hearings.

3. Whether estoppel, and nonretroactivity, considerations should prevent the respondent Bank from denying such authority?

4. Whether the respondents Federal Reserve Bank and Board failed to answer requests for dismissal information and

hearings under the APA at 5 U.S.C.A. 555(e)?

5. Whether internal censure, disbarring the petitioner de facto from specialized Bank Holding company regulatory law practice, required a hearing?

6. Whether appellate summary judgment, rather than jury trial, could weigh: (A) unopposed evidence of customary tenure (contrary to Perry v. Sindermann, after ten years service); (B) uncontradicted evidence that slander heard by a disinterested Bank visitor was excessive and unprivileged?

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 650 F.2d 1093. The opinion of the District Court for the northern District of California was not officially reported. Copies are in the Appendices.

JURISDICTION

The judgment of the Court of Appeals was rendered July 13, 1981. A timely petition for rehearing and suggestion for rehearing en banc was denied October 9, 1981. This petition for a Writ of Certiorari was then filed within ninety (90) days of the denial of the petition for rehearing. Jurisdiction in this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Federal Reserve Act, Section Four, Fifth, 12 U.S.C.A. 341 (Fifth):

> Upon the filing of the organization certificate with the Comptroller of the Currency a Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power -- ....
>
> Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees ....

The Federal Reserve Act, Section 11(j), 12 U.S.C.A. 248(j):

> The Board of Governors of the Federal Reserve System shall be authorized and empowered: .... (j) To exercise general supervision over said Federal Reserve banks.

The National Bank Act, Section 24, Fifth, 12 U S.C.A. 24 (Fifth):

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power -- ....
>
> Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.*

The Administrative Procedure Act, Section 555(e), 5 U.S.C.A. 555(e):

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief

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* Emphasis has been added, unless otherwise indicated.

statement of the grounds for denial.

California Civil Code, Section 47(3):

> A privileged publication or broadcast is one made -- 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

STATEMENT OF THE CASE

The petitioner, William R. Bollow, after eleven years as a Federal Reserve System attorney, specializing in Bank Holding Company Act regulatory actions, was summarily fired, without even customary severance pay -- because he allegedly shouted 'profanities' and used abusive language in requesting assistance from a secretary.

His written requests for a hearing to test the disputed charges, also the harmful internal censure implied as to his specialty, and for relevant information went unanswered by his employer, the respondent Federal Reserve Bank of San Francisco, also by his employer's parent government agency, the respondent Board of Governors of the Federal Reserve System. [See e.g. Appendix D.]

No hearing took place or was deemed to have taken place. Bank Ombudsman Langhorne confidentially reviewed matters and recommended that the termination "was implemented fairly" [E]. Bank President Balles then met with the petitioner and confirmed respondent Reilly's abrupt decision to fire him, for allegedly insulting a secretary. At that point, the secretary even objected [D4-7], but the Bank ignored her new

evidence, negating a discharge for "misconduct" (under Bank rules [B5-6]).

Suit was initiated in District Court on Federal question jurisdiction against agencies and officers of the United States under 28 U.S.C. 1331; also 12 U.S.C. 341 (Fourth) and 632 (concerning the Bank and State claims against it). Jury trial was demanded.

The petitioner claimed bad faith and tortious breach of contract, and slander as well, under California law against the respondent Bank, Reilly and Does. Also, fraud (which issue is not among those specifically presented in this petition).** Actual, compensatory and punitive damages were sought.

** The alleged fraud was designed to hide a regulatory impropriety, which had used a proposed (Oct. 6, 1975), later promulgated (Oct. 20), cease and desist order, undeniably without notice to all persons affected, to (continued)

Federal declaratory relief (and/or backpay) was sought against the Bank and Board, because a hearing was denied and written requests went unanswered.

At the outset of the case, the Board was dismissed (as the "federal defendant"), because it was not the petitioner's employer [B1-2, affirmed A34].

The Bank and Reilly later moved for summary judgment (on affidavits primarily addressed to their defenses under State law, except as to fraud, which was simply denied). The petitioner moved for partial summary judgment, but

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trick one such unsuspecting bank purchaser into subsequently paying over a forfeitable purchase deposit ($685,000.00 on Oct. 8). This produced a consenting seller's windfall, later publicly disclosed in a 1976 SEC report (10-K) (filed by Central Banking Systems, Inc., Oakland, Cal.). [Certification of the record (CR33, Exhibits V-C(1) and V-D) evidencing fraud is being requested pursuant to Rule 19.]

only insofar as a specified notice form had not been completed by the Bank under its rules, and only insofar as the Bank failed to respond to five written requests under the Administrative Procedure Act at 5 U.S.C.A. 555(e).

The District Court ruled (without argument on the point) that State law regarding Bank terminations had been preempted, because Federal Reserve Banks could dismiss employees at will or "at pleasure" under 12 U.S.C.A. 341 (Fifth).

Summary judgment was also awarded against the petitioner on slander, and on fraud; also, on his APA requests, on the theory that "agency proceedings" weren't involved, and agency discretion precluded response [B7-8, affirmed A28-30].

The District Court added that the petitioner had no liberty right to due process since only stigma of "professional incompetence" conceivably existed

[B9], and no such property right because the Bank's written promises of due process were unsupported by bargained for consideration [B4], and by Bank powers [B9].

The Ninth Circuit Court of Appeals affirmed. It also ruled that not only were State process and tenure rights (for both Federal Reserve and National Banks) preempted, but "that [Bank] attempts to create such rights by reference to independent sources are violative of the statute [12 U.S.C.A. 341 (Fifth)] and void thereunder." [A12, also A9.] President Balles lacked authority to promise such rights, and his form letter doing so was void, although ostensibly accepted by directors of the Bank, and by the Board under 12 U.S.C.A. 248(j) [A17-22, Cf. A7 n.1].

At this point, question was raised for the first time, and decided (without

input from the parties), i.e. that the Bank could not be estopped on the basis of its affirmative misconduct, because reasonably relied upon statutory authority never existed [A20-22, supra].

Concerning de facto tenure rights, the Court said there had to be some evidence of further affirmative conduct, under Perry v. Sindermann, 408 U.S. 593 (1972), even though the Court had already implied that the Bank could not affirmatively attempt to create tenure rights [A15-17, A12]. "Longevity" was meaningless [A15], and reliance on Federal statutory age-discrimination policies protecting persons over age forty was "frivolous" [A23]. It was not enough to warrant trial, that the petitioner was the only Bank employee ever fired over forty after ten years, for any reason.

The Bank's 'misconduct' charges were unpublicized, and amounted to no more

than "inability to get along" [A26-27]. Also, the petitioner had:

> retained his license to practice law, and there is nothing in the record except his own conclusory testimony to support the contention that he cannot find bank regulation or other legal work because of his dismissal [A28].

Nothing was said about the petitioner's ability to represent Bank Holding Company regulatory clients to the FED.

There was no case for fraud [A34-36]. And, even though such a case existed for slander, Bank Vice President Sims' remarks that the petitioner was "unprofessional" and a troublemaker [G3, 6] were privileged (and not excessive), since the hearers were <u>both</u> interested [A30-33, and Appendix C modification. <u>Cf</u>. F1-10.]. Also, sanctions for <u>evasive</u> discovery, seen as "dilatory", were properly denied [A33-34].

REASONS FOR GRANTING WRIT

I. Whether State law can inhibit, but not prevent, Federal Reserve (and National) Bank terminations, by requiring fair procedure and good faith? should be settled by this Court.

In the past, this important question of Federal preemption has resolved itself in favor of State law applicability. See Armano v. Federal Reserve Bank of Boston, 468 F.Supp 674 (D.Mass March 30, 1979), which is the only case to date interpreting the power "to dismiss at pleasure" in 12 U.S.C.A. 341 (Fifth). Thus, crucial doubts now exist concerning the uniform application of State contract and tort laws restraining at will employee terminations, in all Federal Reserve Districts.

This Court has recently reiterated its preemption standards in Chicago & N.W. Transportation Co. v. Kalo Brick & Tile, 450 U.S. 311, 317 (1981):

> Pre-emption of State law by federal statute ... is not favored 'in the absence of persuasive reasons....'.

See also Addison v. Holly Hill Co., 322 U.S. 607, 617 (1944):

> [I]t is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

Further analysis, as required, rules out Federal preemption:

A. Congress intended to proscribe enforceable fixed term employments, but not minimal fair termination procedures--"at pleasure" in the National Bank Act at 12 U.S.C.A. 24 (Fifth), copied at 12 U.S.C.A. 341 (Fifth) in the Federal Reserve Act. Such employees can be recalled without reasons at any time.

Rankin v. Tygard, 198 F.795, 798-99 (8th Cir. 1912); Armano, supra. However, bad faith reasons were never approved!

B. Neither Federal Reserve nor National Banks can be excused, absent more specific statutory dispensation, from local proprietary burdens redressing unfairly effectuated terminations. See Federal Reserve Bank of St. Louis v. Metrocentre Imp. Dist., 657 F.2d 183, 186 (8th Cir. 1981), U.S. appeal 81-865.

C. Federal Reserve Bank terminations weren't meant to be treated differently under State law from National Bank terminations. Each has "virtually identical" power [A8 n.3]. But National Banks anomalously only can fire officers, not employees, "at pleasure".[1] The Comptroller of the Currency tried to deal

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[1] House Report No. 69, 63rd Cong. 1st Sess. (1913), at 36:
(continued)

with the problem by regulation (now void in part). See 12 C.F.R. 7.5220:

> The board of directors of a national bank pursuant to paragraph Fifth of 12 U.S.C. 24 may enter into employment contracts with its officers and employees upon reasonable terms and conditions.

Cf. Kemper v. First National Bank In Newton, 94 Ill.App.3d 169, 170 (1981).

This Court should determine that California law restrains the respondent Bank's power to fire, i.e. without good faith and fair dealing,[2] contrary to

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> [T]his section is to authorize ... a reserve bank in each district with powers precisely analogous to those of national banks except in so far as altered....

[2] Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 179 n.12 (1980); Pugh v. See's Candies, 116 Cal.App.3d 311, 324-330 (1981), modified 117 Cal. App.3d 520a.

public policy,[3] or without a hearing (when exclusion from a limited legal specialty is involved).[4] [A7 and n.2, B3-4.]

II. Two conflicting Circuits (and Federal Reserve Board regulations) recognize that agencies can bestow such hearing rights (certainly post-termination hearing rights).

The FBI can confer process rights on at will and non-civil service employees by letter almost identical to the form letter sent the petitioner [A17 n.5]. Ashton v. Civiletti, 613 F.2d 923, 929 (DC Cir. 1979) (per McGowan, J.), i.e.:

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3 Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184 (1959).

4 Ezekial v. Winkley, 20 Cal.3d 267 (1977). See also Miller v. Eisenhower Medical Center, 27 Cal.3d 614 (1980).

> 'You may assume your position is secure, if you continue to do satisfactory work.'

Thus, the DC Circuit directly disagrees that petitioner's Federal employer couldn't confer a purely procedural property interest under Perry v. Sindermann, 408 U.S. 593 (1972), despite "a clearly implied promise of continued employment" under Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Fifth Circuit also directly disagrees. Young v. United States, 498 F.2d 1211, 1218-1222 (5th Cir. 1974) (per Wisdom, J.). Such procedural rights derive from inherent "executive" powers (Id. at 1221) and "need not be, and in fact often are not, grounded in federal statutory law" (Id. at 1219), under Arnette v. Kennedy, 416 U.S. 134 (1974).

Contrary dicta regarding sui generis military power to fire, in another 5th

Circuit decision, is distinguisable. See Sims v. Fox [A10], 505 F.2d 857, 862 (5th Cir. 1979, en banc), cert. denied, 421 U.S. 1011 (1975). Cf. Bishop v. Wood, 426 U.S. 341, 345 and n.8 (1976), indicating "'at pleasure or at will'" municipal employer power can be limited by procedural 'property' rights "conditioning an employee's removal".

Pursuant to its parental powers at 12 U.S.C.A. 248(j) supra, the respondent Board of Governors has promulgated regulations (now void in part) giving process rights to Bank employees terminated for unionization activities. 12 C.F.R. 269.6 and 292. The Board's 248(j) powers also arguably sanctioned the Bank's 'unauthorized' letter. And, these powers similarly endow Federal Reserve Banks (unlike National Banks) with in-house ability to implicate Fifth Amendment rights.

Further, even if the respondent Bank can't promise pre-termination process, no reason exists to deny a post-termination hearing, not affecting "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee". See Arnette, supra at 168 (Powell, J., concurring). Such a prompt hearing concerning 'misconduct' might have restored full severance pay -- and, more importantly, the petitioner's ability to represent potential Bank Holding Company clients to the Federal Reserve System, without harmful internal censure.

III. Estoppel ought to apply here against the government because: (A) retroactivity for an interpretation of first impression denying plausible statutory authority is inequitable, under Chevron Oil v. Huson;

and (B) sovereign immunity never applies to proprietary Bank representations.

"Affirmative misconduct" involving a misrepresentation by a government official must be authorized before it can be estopped[5] under Federal Crop Insurance

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5 In three cases, this Court has implied that the government can be estopped on the basis of "affirmative misconduct". Moser, 341 U.S. 41, infra; Montana v. Kennedy, 366 U.S. 308, 314-315 (1961); Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973), reversing 475 F.2d 7 (9th Cir. 1973). See also Santiago v. INS, 526 F.2d 488 (9th Cir. 1975, en banc), cert. denied, 425 U.S. 971 (1976); United States v. Ruby Corp., 588 F.2d 697, 701-703 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); Morris v. Andrus, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, 444 U.S. 863 (1979). See also Natl. Treasury Employees Union v. Reagan, 509 F.Supp 1337, 1347 (D.DC 1981, affirmed 50 L.W. 2139 (DC Cir. 1981). Cf. Lavin v. Marsh, 644 F.2d 1378, 1384 (9th Cir. 1981) [A20-22 and n.7]; Jablon v. United States, 657 F.2d 1064, 1067 n.5, 1067-1070 (9th Cir. Sept. 28, 1981), applying promisory estoppel to a statutorily unauthorized (continued)

Corp. v. Merrill, 332 U.S. 380, 384-385 (1947) [A20-22]. However, misleading circumstances" and "elementary fairness" can compel a contrary result, even where actual knowledge exists concerning the lack of government statutory authority. Moser v. United States, 341 U.S. 41, 47 (1951). See, Davis, "Administrative Law Treatise" (1st ed. 1958) at 498-504, discussing the apparent conflict between these two important cases.

Thus, the case at bar presents a question which should be further settled by this Court: Assuming "affirmative misconduct", when, if ever, can the

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government promise, barred nonetheless by sovereign immunity. Thus, "affirmative misconduct" can justify an estoppel, even where the government promises a benefit without intending to mislead, as in Jablon, Ibid. But see Schweiker v. Hansen, 450 U.S. 785, 789, 795 (1981, per curiam) (Marshall, J., joined by Brennan, J., dissenting) (which involved "less than 'affirmative misconduct'" and unwritten false representations).

government be estopped to deny that it had statutory authority to make a false promise?

A. Even a strong judicial interest in upholding the legislative authority of Congress is subject to judicial power to make a decision operate nonretroactively. Cf. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) (per Hughes, C. J.):

> ... The past cannot always be erased by a new judicial declaration....Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and its previous application, demand examination.

Thus, in Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), this Court refused to apply a statutory interpretation of first impression retroactivily, to foreclose liability in tort:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied,... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Secondly, this Court said it would ask whether nonretroactivity would further or retard the intended or effective operation of a Federal statute; and thirdly, whether retroactivity would result in inequity. See also Lemon v. Kurtzman, 411 U.S. 192, 197-201 (1972), affirming 348 F.Supp 300 (E.D.Pa 1972): the problem is "essentially one relating to the appropriate scope of Federal equitable remedies." Id. at 199. Cf. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947), decided the same year as Merrill, supra.[6]

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[6] The Chevron criteria have been stated as five factors to be weighed. See Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (DC Cir. 1972): "(1) whether the (continued)

Estoppel was belatedly raised by the Ninth Circuit in its opinion; and, nonretroactivity was never argued or considered, although this most important subsidiary issue deserved its day in court (and a Chevron balancing test!):

Previously, Federal Reserve Banks never saw themselves exempt from State law, or unable to confer process rights, with respect to terminations. The settled past was exemplified by a personnel manual, and strongly reinforced at the time of the Bank's letter by Perry, Roth, and Arnette, supra. Substantive

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particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."

rights to non-terminable employment clearly could not be granted. Rankin v. Tygard, supra. But there was no reason to doubt authority to create procedural rights.

The historical purposes of Congress would not be offended, nor would there be interference with the way Federal Reserve Banks operated and need to function. And, it must be assumed that the petitioner reasonably relied to his detriment [A20-22]. Also, such reliance is justified, even though 12 U.S.C.A. 341 (Fifth) was without judicial construction at the time. See Lemon, supra at 207-209.

B. When government acts in a proprietary capacity, the application of estoppel (and nonretroactivity) principles rarely will be inconsistent with the public interest. Moreover, Federal Reserve Banks were created without sovereign immunities historically

subject to waiver. Cf. Kalopodes v. Federal Reserve Bank of Richmond, 367 F.2d 47 (4th Cir. 1966); Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 448 (2d Cir. 1940).

Just as proprietary slanders are actionable, common law misrepresentations are as well -- and, estoppel should be equally applicable. In addition, the petitioner's claim to hearing rights presents a more typical question of declaratory relief under Moser, supra, rather than one of monetary liability traditionally immunized.

IV. The DC Circuit disagrees that written requests for information as to a less than honorable discharge, or for a hearing, can go without APA written reasons for denial.

Square and irreconciliable conflict is present here. The Air Force (unlike

the respondents) must respond if written reasons for a less than honorable discharge have been requested, even when no hearing was required. Thus, an "at pleasure" general discharge involves an "agency proceeding" under the Administrative Procedure Act at 5 U.S.C.A. 555(e), since "it is equivalent to finding that the serviceman has performed inadequately on the job." Roelofs v. Secretary of Air Force, 628 F.2d 594, 599-601, 604 (DC Cir. 1980) (Bazelon, J., concurring):

> It would be a rare case indeed in which the plaintiff could not make a plausible enough contention to require the government to state the reasons for its action.
>
> Id. at 601.[7]

Moreover, in the case at bar, the respondents ignored a hearing request,

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[7] See also King v. United States, 492 F.2d 1337 (7th Cir. 1974); Mower v. Britton, 504 F.2d 396 (10th Cir. 1974).

upon new evidence negating 'misconduct' [D]. Such an "arbitrary and capricious" action is reviewable under the APA at 5 U.S.C.A. 706(2)(A and B). Hadigian v. Board of Governors of the Federal Reserve System, 463 F.Supp 437 (1978), affirmed without opinion, 612 F.2d 586 (DC Cir. 1980).

The status of Federal Reserve Banks as agencies under the APA obviously also warrants clarification by this Court.[8]

V. The DC Circuit disagrees that harmful internal censure, which

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8 Without exception Federal Reserve Banks have been considered agencies for such Federal statutory purposes. See e.g. Federal Reserve Bank of Richmond v. Kalin, 77 F.2d 50, 51 (4th Cir. 1935); Brink's Inc. v. Federal Reserve Bank of Richmond, 466 F.Supp 116 (D.DC 1979). Cf. Federal Reserve Bank of St. Louis v. Metrocentre Imp. Dist., supra. See also Rocap v. Indiek, 539 F.2d 174 (DC Cir. 1976) concerning the APA agency status of highly similar Federal Home Loan Banks.

> adversely affects substantial potentials for dealing with the government as a Bank Holding Company Act regulatory lawyer, can go untested.

Precisely this kind of devastation to a long nurtured legal specialty, forcibly prompted the petitioner to bring his suit [e.g. H]. And, the Ninth Circuit largely ignored the case presented here: For, even though the petitioner retained semblance of reputation in his field,[9] he could not in good faith escort clients before the Federal Reserve System, knowing that the cloud over his head would prejudice their Bank Holding Company regulatory applications.

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[9] Cf. Reference in "Who's Who in California" to the petitioner and his Bank Holding Company Act regulatory specialty (1964-1975), (13th ed. 1981), at 56.

Potential clients also knew this [F and G].

The DC Circuit has conflictingly ruled that such a substantial government supplier has a liberty interest which would be implicated by initially unpublicized internal agency charges of "lack of responsibility and integrity", accompanied by a loss of "virtually all Government work". Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 955, 957-958, 961-966 (DC Cir. 1980). See also Gonzalez v. Freeman, 334 F.2d 570, 574 (DC Cir. 1964) (per Burger, J.).[10]

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10 Cf. Greene v. McElroy, 360 U.S. 474, 506-508 (1959), requiring a pre-denial hearing with respect to an aeronautical engineer's security clearance, because denial substantially interfered with opportunities to find employment in defense-related industries. See also Transco Security, Inc. of Ohio v. Freeman 639 F.2d 318, 321 (6th Cir. 1981), cert. denied 50 L.W. 3245 (Oct. 5, 1981); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1258-1260 (2nd Cir. 1975).

Moreover, the Ninth Circuit has previously recognized that a property interest might derive from vulnerable career status conferred by a government employer, under California common law. Compare Heath v. Redbud Hospital Dist., 620 F.2d 207, 210-211 (9th Cir. 1980) with Ezekial, supra 16 n.4.

VI. Summary judgment shouldn't (A) deny de facto tenure after ten years service in a vulnerable professional specialty; nor, (B) regard an outsider, whose purpose was unclear, as privileged to hear the petitioner called "unprofessional" and a troublemaker.

A. De facto tenure affects fewer people and arises less frequently than the previously discussed issues, but it may be even more important. Arguably, tenure to some degree is essential to the

independence and non-political character of the Federal Reserve System. And, direct conflict exists with this Court's principal decision guaranteeing some job security (i.e. through plenary trial!) for old-timer government professionals:

Perry v. Sindermann, 408 U.S. 593, 601-602 (1972), and supra, said:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service -- and from other relevant facts -- that he has a legitimate claim of entitlement to job tenure .... [T]here may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure.

In the case at bar, the record contained discovery from the respondent Bank (and no opposing evidence) showing that the petitioner was the only person actually fired (also the only professional), during a court decreed sample period, who was over forty with ten years

prior service [A14-16]. [Compare protected Bank discovery (CR 99), as to which Rule 19 certification is being sought (also CR 95 and 98 with respect to this hard fought discovery).] There were only seven resignations, and no firings, prior to the petitioner's, all with full severance pay.[11]

The Ninth Circuit necessarily assumed that the Bank never fired anyone over forty with ten years service, yet concluded there 'absolutely' could be no case for common law tenure at trial (nor for Bank "affirmative conduct" consistent with such tenure), relying on Board of

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11 The Bank even volunteered, in effect, that it had fired no one over forty prior to the petitioner, contrary to the Court's speculation, i.e.: "It might well be that the Bank has dismissed numerous employees over 40 with less than 10 years..." Further, the suggestion that such a class, based exclusively on age, might be acceptable is less reasonable than a class combining age and longevity.

Regents v. Roth, 408 U.S. 564, 578 (1972), and supra [A 16 and n.4].

But, Roth involved a "relatively new teacher [Id. at 566]" without longevity, denied tenure under an existing de jure tenure program.[12] And, Perry did not specify how policies and practices establishing such a custom must be proven (or drawn out of opposition witnesses).

This Court should clarify when longevity mandates trial with respect to de facto tenure (to determine the existence of a property interest requiring due process). Also, whether Federal age discrimination policies are relevant to this issue [A23]. Also, whether

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12 See e.g. Ryan v. Aurora City Board of Education, 540 F.2d 222, 227 (6th Cir. 1976), cert. denied, 429 U.S. 1041 (1977). Cf. Soni v. Board of Trustees, 513 F.2d 347 (6th Cir. 1975), cert. denied 426 U.S. 919 (1976) (recognizing special needs and implying de facto tenure after six years service).

the petitioner's version of the facts produced, i.e. that customary tenure existed, should be accepted for purposes of summary judgment. Cf. Bishop v. Wood, supra, 426 U.S. 348 and n.11.

B. Finally, the Ninth Circuit should not have summarily determined that Philip Zachary was privileged to hear the petitioner slandered. [See G, establishing that the Bank's "unprofessional" reference inter alia conveyed the slanderous impression that the petitioner was a troublemaker (as alleged) under Albertini v. Schaefer, 97 Cal.App.3d 822, 834-835 (1979).]

The record is inadequate to support a summary finding of privilege under California Civil Code 47(3). The petitioner deserves opportunity to show that Zachary visited the Bank for reasons unrelated to him, and that Zachary understood that Allan Townsend was only

interested as a "friend". Afterall, Zachary's interest was described as "only peripheral...at best". [Compare G with F (in which the Bank doesn't even mention Zachary).] Cf. Phillips v. Marietta Corp. 400 U.S. 542 (1971).

Moreover, the question whether a privileged occasion is abused is a mixed question of fact and law for the jury under California law. Frisk v. Merrihew, 42 Cal.App.3d 319 (1974). A contrary inference can be drawn that Zachary lacked sufficient interest (and, even such an inference against the weight of the evidence forecloses summary judgment).[13]

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13 Cf. Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (1979), quoting Rosenthal v. Rizzo, 555 F.2d 390, 392-394 (3d Cir. 1977), cert. denied, 434 U.S. 892 (1977). See also Poller v. Columbia Boradcasting System, Inc. 368 U.S. 464, 472-473 (1962).

For the foregoing reasons, Writ of Certiorari should be granted.

Respectfully Submitted,

William R. Bollow

December 31, 1981

San Francisco

Appendix

81-1224

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

WILLIAM R. BOLLOW,
Petitioner,

VS.

FEDERAL RESERVE BANK OF SAN FRANCISCO, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, LOUIS E. REILLY, DOES I through XX, Inclusive,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDICES TO PETITION FOR CERTIORARI

WILLIAM R. BOLLOW, *pro se*
1457 Baker Street
San Francisco, CA 94115
(415) 563-8230

APPENDICES

APPENDIX A - Ninth Court Opinion.

APPENDIX B - District Court Orders.

APPENDIX C - Ninth Circuit Opinion, Modified, Rehearing Denied.

APPENDIX D - Hearing Request (upon new evidence negating misconduct) [CR 123, Exhibits L and K].

APPENDIX E - "Confidential" Ombudsman's Findings [CR 120, Langhorne Declaration, Exhibit A.]

APPENDIX F - Sims Delcaration on Slander [CR 120, Exhibit A].

APPENDIX G - Townsend Declaration on Slander [CR 136].

APPENDIX H - Letters Regarding Harmful Internal Censure Affecting Law Clients [CR 123, Exhibit P].

APPENDIX A

Ninth Circuit Opinion

William R. BOLLOW, Plaintiff-Appellant,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, Board of Governors of the Federal Reserve System, Louis E.Reilly, Does I through XX, Inclusive, Defendants-Appellees.

No. 79-4414

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 10, 1981.

Decided July 13, 1981.

Modified, Rehearing Denied Oct. 9, 1981.

William R. Bollow, pro se.

Donald D. Connors, Jr., George C. Stoll, San Francisco, Cal., argued for defendants-appellees; James L. Meeder, Brobeck, Phleger & Harrison, George C. Stoll, San Francisco, Cal., on brief.

Appeal from the United States District Court for the Northern District of California.

Before TRASK and KENNEDY, Circuit Judges, and BONSAL,* District Judge.

TRASK, Circuit Judge:

Appellant Bollow was terminated by the Federal Reserve Bank of San Francisco (the Bank) after eleven years of employment as a regulatory attorney specializing in the Bank Holding Company Act. Bollow alleges breach of contract, constitutional, and tort claims against the Bank and several of its officers. He also alleges that he was fired because he uncovered allegedly illegal regulatory activity on the part of the Bank and the Federal Reserve Board (the Board). The

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* Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

Bank contends that it had authority to dismiss Bollow by virtue of 12 U.S.C. §341, Fifth. The district judge granted summary judgment in favor of all defendants. We affirm.

I

On October 28, 1975, Bollow was involved in an altercation with a Bank secretary, during which he allegedly shouted profanities and used abusive language. This incident was observed by Bollow's immediate superior, Reilly, Vice-President and General Counsel to the Bank, who determined that it justified Bollow's immediate dismissal. Accordingly, on the following day Reilly requested that Bollow resign because of his inability to get along with other Bank employees, as evidenced by the alleged shouting altercation and other

similar incidents involving Bollow. When Bollow refused to resign, Reilly informed him that he was to be terminated immediately.

On October 30, Bollow met with the Senior Vice-President of the Bank, Sims, to discuss his termination. Sims declined to overrule Reilly's decision to dismiss Bollow, although he did postpone Bollow's dismissal for two weeks. Bollow stopped working at the Bank in early November following an exit interview with the Bank's Personnel Officer, Murray.

On November 25, pursuant to a suggestion by Sims, Bollow submitted a written appeal to the Bank President, Balles. At about this time, the Bank Ombudsman, Langhorne, commenced an independent review of the circumstances of Bollow's termination. On December 15, Langhorne informed Balles that she found the termination to have been "implemented

fairly and within the established personnel policy of the Bank." On January 13, 1976, Bollow was told in a meeting with Balles and Murray that the decision to terminate him was final.

Bollow then filed suit in the district court against Reilly, the Bank, the Board, and twenty Doe defendants. He alleged various breach of contract and tort claims, as well as violations of his constitutional due process rights. The court granted summary judgment in favor of the Board on the ground that it was actually and legally uninvolved in Bollow's termination. It rendered summary judgment in favor of Reilly and the Bank on the grounds that the termination of Bollow without a hearing violated none of his statutory or contractual rights and implicated no constitutionally protected property or liberty interest. Appeal was properly taken from these

judgments, and this court has jurisdiction pursuant to 28 U.S.C. §1291.

II

The statutory provision that governs dismissal of Federal Reserve Bank employees is section Four, Fifth of the Federal Reserve Act of 1913 (the Act):

> [A] Federal Reserve bank ... shall have power --
>
> * * * *
>
> Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers and employees.

12 U.S.C. §341, Fifth (emphasis added).

Bollow contends that the dismissal "at pleasure" language of this statute refers only to the power of reserve banks to terminate an officer or employee without consulting the Board, and that

the process rights of reserve bank employees must be determined by reference to state law.[1] Bollow asserts that under California law he was considered an "at-will" employee entitled to a hearing before being terminated.[2]

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[1] Bollow marshals little support for this position. The statutory authorities cited by him are unpersuasive and largely irrelevant. Section Four, Fourth, 12 U.S.C. §341, Fourth, merely provides that reserve banks may sue and be sued in state courts. Sections 11(f) and (j), 12 U.S.C. §248(f) & (j), provide only that the Board may remove any reserve bank officer or director, and that it has supervisory power over such banks. Bollow's reliance on American Bank & Trust Co. v. Federal [sic] Bank [256 U.S. 350 (1920)] is likewise unavailing. That case merely outlawed an anti-competitive practice of reserve banks. Finally, that the Bank failed to argue below the inapplicability of state law is immaterial; in articulating the law, the district courts are not limited by what is argued to them by the parties.

[2] California law also requires that the employer act in good faith in terminating such an employee, and that the termination be consistent with public policy.

The only reported opinion construing section Four, Fifth is Armano v. Federal Reserve Bank of Boston, 468 F.Supp. 674 (D.Mass.1979). In Armano, the plaintiff alleged that the bank had breached its employment contract with him by terminating him without just cause. Id. at 675. The court found that reserve banks are strictly limited to the powers expressly granted them by the Act, and that "a contract that binds the Bank by requiring just cause for dismissal prevents the Bank from exercising its express power [under section Four, Fifth] to dismiss an employee at pleasure." Id. at 676. Accordingly, the court held the contract void and unenforceable because the bank lacked authority to enter into it. Id.[3]

---

[3] As authority for its holding, the court relied on two state court decisions which reached the same result in construing section 24, Fifth of the National Bank Act, 12 U.S.C. §24, Fifth. See (continued)

Thus, the court read section Four, Fifth as limiting the powers of reserve banks as well as restricting the rights of employees. No process rights are conferred on reserve bank employees by section Four, Fifth, and efforts to confer such rights -- as, for example, by contract -- are void as violative of the statute.

Language from two other cases not cited by the Armano court lends analogous support to its construction of

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Kozlowsky v. Westminster Nat'l. Bank, 6 Cal. App.3d 593, 596-97, 86 Cal. Rptr. 52, 53-54 (1970) (citing In re Paramount Publix Corp., 90 F.2d 441, 443 (2d Cir. 1937); Copeland v. Melrose Nat'l. Bank, 229 A.D. 311, 241 N.Y.S. 429, 430, aff'd, 254 N.Y. 632, 173 N.E. 898 (1930). Section 24, Fifth of the National Bank Act is virtually identical to Section Four, Fifth of the Act. The Armano court also relied on a policy of allowing unfettered personnel discretion to reserve banks so that they might efficiently discharge their financial responsibilities. 468 F.Supp. at 676.

section Four, Fifth. In construing a statute which provides that Air Force reserve officers may be discharged "at the pleasure" of the President, the Fifth Circuit in Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975) stated the following:

> Neither has [the officer] pointed to any express terms in his contract or to any governmental regulation that might have led him to believe he had ... a right [to remain in the Air Force]. An Air Force contract or regulation cannot grant that which Congress has specifically withheld. The Air Force must act within the authority delegated to it by Congress or, in certain cases, by the President. Any "regulations" or "contracts" attempted in excess of that authority would be void.

Id. at 862 (dicta). In Ventetuolo v. Burke, 470 F.Supp. 887 (D.R.I. 1978), aff'd, 596 F.2d 476, 481-82 (1st Cir. 1979), the plaintiff was given explicit assurances by his supervisor that he

could retain his job as long as funding for it were available, despite the fact that the governing statute provided that the plaintiff served "at the pleasure" of the commissioner. 470 F.Supp. at 891-92. The court held:

> These discussions do not establish a legal entitlement to continued employment binding on the Commissioner. [The supervisor] lacked both actual and apparent authority to promise employment for an indefinite period of time, conditioned only on the availability of federal funds. Such a promise ... would abrogate the commissioner's statutory authority to terminate at will.

Id. at 892.

[1-3] Based on the foregoing authorities, we conclude that no process or tenure rights are conferred on reserve bank employees by section Four, Fifth. See also Field v. Boyle, 503, F.2d 774, 777-78 (7th Cir. 1974). We further conclude, based on the same authorities,

that attempts to create such rights by reference to independent sources are violative of the statute and void thereunder. Assuming that Bollow would indeed have been entitled to certain process rights under California law, such law when applied to reserve bank employees conflicts with section Four, Fifth. In such circumstances, the federal statute must control. U.S. Const., Art. VI, cl. 2. Accordingly, we hold that the district court did not err in refusing to apply California law to Bollow's termination.

[4] Bollow also argues that, notwithstanding section Four, Fifth, the Bank was required to comply with its published personnel manual, and that it failed to do so. The district judge found that the Bank substantially complied with the manual procedures for discharging employees for misconduct.

This finding is adequately supported by the record. Thus, even if we assume that the Bank's authority to discharge employees pursuant to section Four, Fifth is somehow limited by the personnel manual, we find that the Bank has complied with the requirements of the manual.

III

Bollow next contends that his termination by the Bank deprived him of due process of law in violation of the fifth amendment. To invoke the process guarantees of the Constitution, however, Bollow must first show that the Bank deprived him of a property or a liberty interest.

A

[5] To have a property interest in a governmental benefit, including employment, an individual must have an

entitlement to the benefit. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Such entitlements are created by "rules or understandings" that stem from an independent source, such as relevant statutes, regulations, and ordinances, or express or implied contracts. Id; Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Bollow identifies three possible sources for his entitlement to continued employment at the Bank:

> 1. "Custom, practice, and policy" -- Bollow asserts that he was the only employee over forty years of age with more than ten years on the job ever to have been fired by the Bank for such a "flimsy" reason.
>
> 2. A written assurance from the Bank president that he would not be dismissed so long as his work was satisfactory.
>
> 3. Federal age-discrimination laws.

We approach Bollow's asserted "custom, practice, and policy" with caution. It is always possible to restrictively define a class so that it includes only a desired person. The class identified by Bollow is really a subclass consisting of the intersections of several larger employee classes -- those over forty, those with more than ten years of experience, and those allegedly discharged for "flimsy" reasons. It might well be that the Bank has dismissed numerous employees over 40 with less than 10 years, or under 40 with 10 or more years, for reasons similar to those given for Bollow's dismissal.

[6-8] With this in mind, we find that this alleged source is insufficient to create an entitlement. Longevity alone does not create a property interest. Perry v. Sindermann, supra, 408

U.S. at 601-02, 92 S.Ct. at 2699-700; McElearney v. University of Illinois, 612 F.2d 285, 290-91 (7th Cir. 1979); McNeill v. Butz, 480 F.2d 314, 320 (4th Cir. 1973). An entitlement may spring from an understanding, but the understanding must be "mutually explicit." Board of Regents v. Roth, supra, 408 U.S. at 577, 92 S.Ct. at 2709. In this instance, such an understanding cannot be had solely from the Bank's prior failure to terminate someone like Bollow; there must have been at least some sort of affirmative conduct on the part of the Bank. Cf. Perry v. Sindermann, supra, 408 U.S. at 599-600, 92 S.Ct. at 2698-2699 (understanding created by provision in official publication of defendant). See also Board of Regents v. Roth, supra.[4]

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[4] "To be sure, respondent does suggest that most teachers hired on a year-to-year basis by [the college] are, in (continued)

Bollow also relies on an assurance of continued employment communicated to him in a letter from Balles, the Bank president. Essentially, Balles promised Bollow that he would not be terminated by the Bank so long as his work was satisfactory.[5]

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fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him." 408 U.S. at 578 n.16, S.Ct. at 2709 n.16.

[5] The letter states in relevant part:

> I am aware that the Bank's Productivity program has created anxiety in the minds of our employees about job security. While some jobs will be eliminated, the great majority of our employees will remain with the Bank.
>
> To completely remove any concern you may have about your personal situation, you have my assurance that with continued satisfactory job performance, your future

(continued)

[9-11] By promising Bollow employment security in excess of that provided for by section Four, Fifth, Balles clearly overstepped the bounds of his authority under that section. See Part II supra. Thus, any contract which might have been created pursuant to the assurance is void and unenforceable against the Bank. Sims v. Fox, supra, 505 F.2d at 862 (dictum); Armano v. Federal Reserve Bank of Boston, supra, 468 F.Supp. at 676 & n.3. "[T]he United States is neither bound nor estopped by

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with the Bank is secure; no matter what changes may occur in our operating procedures, you will continue to have a job with the Bank. Moreover, even if the nature of your job should change, there will be no reduction in your present pay, and you would continue to be eligible for advancement.

Your efforts to work with me toward achievement of the Bank's goals are appreciated, and I look forward to our continued association.

acts of its officers or agents in entering into an arrangement or agreement to do or cause to do what the law does not sanction or permit." Utah Power and Light Co. v. United States, 243 U.S. 389, 409, 37 S.Ct. 387, 391, 61 L.Ed. 791 (1917); accord Dorl v. Commissioner, 507 F.2d 406 (2d Cir. 1974); United States v. Crance, 341 F.2d 161, 166 (8th Cir. 1965). A void contract is clearly insufficient to support a claim of entitlement to government employment. There being no independent source to support Bollow's claim of entitlement, see generally Board of Regents v. Roth, supra, 408 U.S. at 577, 92 S.Ct. at 2709, we conclude that a constitutionally protected property interest cannot have been created by the assurance.[6]

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[6] The cases have uniformly held that, without more, one who works "at the pleasure" of another has no (continued)

That Bollow may reasonably have thought that Balles had authority to give a valid assurance of continued employment does not affect our conclusion that a protected interest was not created. All persons in the United States are chargeable with knowledge of the Statutes-at-Large. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S.Ct. 1, 3-4, 92 L.Ed. 10 (1947); Lavin v. Marsh, 644 F.2d 1378, 1383 (9th Cir.

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constitutionally protected entitlement to continued employment. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 181-82, 94 S.Ct. 1633, 1657-58, 40 L.Ed.2d 15 (1974) (White, J., concurring and dissenting), and cases discussed therein; Bishop v. Wood, 426 U.S. 341, 345, 347, 96 S.Ct. 2074, 2077, 2078, 48 L.Ed.2d 684 (1976); Mervin v. F.T.C., 591 F.2d 821, 828 (D.C. Cir. 1978); Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977); Ampleman v. Schlesinger, 534 F.2d 825, 828 (8th Cir. 1976); Sims v. Fox, supra, 505 F.2d at 861-62; Field v. Boyle, supra, 503 F.2d at 777-78; Catterson v. Caso, 472 F.Supp. 833, 838 (E.D.N.Y. 1979); see Mazalaski v. Treusdell, 562 F.2d 701, 709 n.23 (D.C. Cir. 1977).

1981). This alone is sufficient for us to assume that Bollow knew that any property interest which might otherwise have been created by the assurance was negated by section Four, Fifth. In addition, however, it is well established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority. E.g., Federal Crop Insurance Corp. v. Merrill, supra, 332 U.S. at 384, 68 S.Ct. at 3; Lavin v. Marsh, supra, at 1383; Gray v. Johnson, 395 F.2d 533, 537 (10th Cir.), cert., denied, 392 U.S. 906, 88 S.Ct. 2056, 20 L.Ed.2d 1364 (1968). Thus, Bollow has no right to relief from negative consequences flowing from his possible reliance on an assurance that Balles was not authorized to make. Accordingly, even absent a presumption that Bollow knew about section Four, Fifth, we still

may properly conclude that the assurance did not confer on Bollow an entitlement to continued employment at the Bank.[7]

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[7] Admittedly, charging private persons with knowledge of the federal statutes and allocating to them the risk of loss from unauthorized conduct by governmental agents are both highly formal legal rules that do not fairly reflect how people interact with the government. Cf. Federal Crop Insurance Corp. v. Merrill, supra, 332 U.S. at 387, 68 S.Ct. at 5 (Jackson, J., dissenting) ("[I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication"). The rules are nevertheless necessary to ensure that the will of Congress is not thwarted by misguided government officials:

> [I]t is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals....
>
> Obviously, Congress's legislative authority should not be readily subordinated to the action of a wayward, or unknowledgeable administrative official.

(continued)

[12] Bollow's assertion that federal age discrimination laws created a constitutionally protected property interest in his favor is frivolous. The mere existence of age-discrimination statutes does not creat job entitlements for government employees over a certain age.

In sum, none of Bollow's asserted sources of entitlement is sufficient to create a constitutionally protected property interest.

B

[13, 14] The liberty protected by the due process clause of the fifth

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Lavin v. Marsh, supra, 646 F.2d at 1383 (quoting Schuster v. Comm'r, 312 F.2d 311, 317 (9th Cir. 1962)). See also Federal Crop Ins. Corp. v. Merrill, supra, 332 U.S. at 385, 68 S.Ct. at 3 (it is the "duty of all courts to observe the conditions defined by Congress for charging the public treasury").

and fourteenth amendments encompasses an individual's freedom to work and earn a living. Thus, when the government dismisses an individual for reasons that might seriously damage his standing in the community, he is entitled to notice and a hearing to clear his name. Board of Regents v. Roth, supra, 408 U.S. at 573 & n.12, 92 S.Ct. at 2707 & n.12; e.g., Goss v. Lopez, 419 U.S. 565, 575, 95 S.Ct. 729, 736, 42 L.Ed.2d 725 (1975). To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to "stigmatize" or otherwise burden the individual so that he is not able to take advantage of other employment opportunities. Board of Regents v. Roth, supra, 408 U.S. at 573-74, 92 S.Ct. at 2707-08; see Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971) (charges reflecting on

"good name, reputation, honor, and integrity").

This court has described the stigma that infringes liberty interests as that which "seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities...." Jablon v. Trustees of California State Colleges, 482 F.2d 997, 1000 (9th Cir. 1973) (emphasis added), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Subsequent panels have set the boundary of liberty interests at accusations of "moral turpitude," such as dishonesty or immorality -- i.e., charges that do not reach this level of severity do not infringe constitutional liberty interests. See, e. g., Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 365-66 (9th Cir. 1976); Gray v. Union County Intermediate Education

District, 520 F.2d 803, 806 (9th Cir. 1975). See also Board of Regents v. Roth, supra, 408 U.S. at 573, 92 S.Ct. at 2707. Thus, in both Stretten and Gray it was held that dismissal for reasons of incompetence and inability to "get along" with co-workers did not infringe liberty interests. 537 F.2d at 366; 520 F.2d at 806; accord Weathers v. West Yuma County School District R-J-1, 530 F.2d 1335 (10th Cir. 1976).

[15-17] The Bank's reasons for firing Bollow were never publicly disclosed. Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm "good name, reputation, honor, or integrity." Bishop v. Wood, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1975); accord Davis v. Oregon State University, 591 F.2d 493, 498 (9th Cir. 1979) (on petition for rehearing);

Haimowitz v. University of Nevada, 579 F.2d 526, 529 (9th Cir. 1978). For this reason alone Bollow's liberty claim must fail. When reasons are not given, inferences, drawn from dismissal alone are simply insufficient to implicate liberty interests. See Board of Regents v. Roth, supra, 408 U.S. at 574, 92 S.Ct. at 2707; Haimowitz v. University of Nevada, supra, 579 F.2d at 529; Davis v. Oregon State University, supra, 591 F.2d at 498. Moreover, even if the reasons had been publicly disclosed, they are no more than the "inability to get along" charges that were held insufficient in Stretten and Gray.

As a final argument, Bollow characterizes himself as a regulatory specialist in banking law, and argues that his dismissal by the Bank has made it

impossible to get another job in this "profession." Cf. Stretten v. Wadsworth Veterans Hospital, supra, 537 F.2d at 366 n.13 ("a label which would prevent an individual from practicing his chosen profession at all may have consequences so severe that liberty would be infringed"). This argument is without merit. Bollow has retained his license to practice law, and there is nothing in the record except his own conclusory testimony to support the contention that he cannot find banking regulation or other legal work because of his dismissal.

IV

[18] Finally, Bollow makes several other contentions, none of which merit reversal of the district court judgment. First, he contends that the Bank violated a provision of the Administrative

Procedure Act (APA), 5 U.S.C. §555(e), by failing to respond to certain written requests that Bollow made in connection with his discharge. Section 555(e) requires that an agency give prompt notice and explanation of the denial of any written request made by an interested person in connection with any "agency proceeding." However, we note that the APA's hearing procedures do not apply to disputes regarding the tenure of employees. 5 U.S.C. §554(a)(2). Moreover, the chapter of the APA providing for judicial review does not apply to "agency action committed to agency discretion by law." Id., §701(a)(2). As we have explained, section Four, Fifth provides for unfettered reserve bank discretion in the decision whether to terminate an officer or employee. Thus, even if one assumes that the Bank is a federal agency within the meaning of the

APA, it does not appear that "Agency proceedings" includes terminations of reserve bank employees pursuant to section Four, Fifth. Accordingly, we hold that the requirements of section 555(e) are inapplicable to the case at bar.

Second, Bollow contends that the district court erred in granting summary judgment in favor of the Bank on his slander claim. The defamation allegedly took place in a meeting between Sims and two of Bollow's acquaintances in the local banking community, Townsend and Zachary. The meeting was held at the request of Townsend, who sought to intervene on Bollow's behalf in the matter of his termination by the Bank. The alleged slander consisted of statements by Sims to Townsend and Zachary that Bollow was a "troublemaker" and had been guilty of

misconduct in his job for a period of three years.

California law provides that

> [a] privileged publication or broadcast is one made --
>
> 3. In a communication, without malice, to a person interested therein, ... (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent, or (3) who is requested by the person interested to give the information.

Cal.Civ.Code §47, subdiv. 3 (West 1972).

[19] The circumstances under which Sims allegedly spoke the asserted defamation clearly make it qualifiedly privileged within the meaning of subdivision three. Both Townsend and Zachary were legitimately "interested" in the reasons for Bollow's termination. Compare Swift & Co. v. Gray, 101 F.2d 976, 979-80 (9th Cir. 1939) (decided under section 47) with Locke v. Mitchell, 7 Cal.2d 599, 61

P.2d 922 (1936) and Campbell v. Jewish Committee for Personal Service, 125 Cal.App.2d 771, 774-75, 271 P.2d 185, 188 (1954). Townsend himself declared that he sought to intercede in the Board's decision to fire Bollow, not merely as Bollow's friend, but also as a representative of his (Townsend's) company and the bank holding company industry. Moreover, Townsend declared that at the time, he was considering offering Bollow a position within his company. Finally, Townsend's declaration shows that Zachary played an active (albeit subordinate) role in this effort to obtain Bollow's reinstatement. Thus, Sims' statements were qualifiedly privileged under subdivision three has having been given in response to a request by interested parties. See generally L. Eldredge, The Law of Defamation §86, at 465-66 (1978); W. Prosser, Handbook on the Law of Torts

§115, at 788-89 (4th ed. 1971); Restatement (Second) of Torts §595 & Comms. e, i, & j, at 268, 270-71, 273-74 (1977). Although this privilege is not absolute, Bollow presented no evidence of malice or any other factors -- e.g., excessive publication -- which might have defeated it. See, e.g., Roemer v. Retail Credit Co., 3 Cal.App.3d 368, 370-71, 83 Cal. Rptr. 540, 542-43 (1970); De Mott v. Amalgamated Meat Cutters and Butchers, 157 Cal.App.2d 13, 27, 320 P.2d 50, 59 (1958). Accordingly, we affirm the district court's grant of summary judgment in favor of the Bank on this claim.

[20, 21] Third, Bollow contends that the district court erred in not imposing sanctions on the Bank for its delay in producing a requested document. The decision whether to penalize a party for dilatory conduct during discovery

proceedings is committed to the sound discretion of the trial court. Fed.R. Civ.P. 37(a)(4); e. g., Marquis v. Chrysler Corp., 577 F.2d 624, 640 (9th Cir. 1978). Because Bollow does not show that he was in any way prejudiced by the delay, we hold that the district court did not abuse its discretion by failing to impose sanctions in this instance. The denial of Bollow's motion for sanctions is affirmed.

[22] Finally, Bollow made several claims below based on an allegation that he was terminated because he exposed Bank and Board irregularities in the handling of a certain regulatory matter. He now contends that the district court erred in granting the Bank's and Board's motions for summary judgment on these claims. Regarding the Board, it is clear that the Board was neither legally nor factually implicated in the Bank's decision to

terminate Bollow. With respect to the Bank, there was offered in support of its motion Reilly's sworn declaration that the decision to terminate Bollow was based solely on the latter's inability to get along with his co-workers. Bollow offered no evidence in response; he merely repeated the allegations of his complaint. A party cannot withstand a motion for summary judgment merely by asserting that the facts are disputed; he must present sufficient evidence to the court to show that there is indeed a genuine issue of material fact. E. g., Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d at 497 (9th Cir. 1981). Bollow's evidence consisted exclusively of disjointed and conclusory allegations based on mere suspicion and belief. He brought nothing before the court to show that he would be able to support his allegations with evidence at

trial. Accordingly, we affirm the district court's grant of summary judgment on these claims in favor of the Bank and Board.

The district court judgment is AFFIRMED.

* * * *

APPENDIX B

District Court Orders

William R. BOLLOW, Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, et al., Defendants.

No. C-76-977-RHS

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

ORDER GRANTING FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause having come regularly on for hearing on the federal defendant's Motion for Summary Judgment; and

All parties having been offered the opportunity to be heard and the Court fully advised in the premises;

IT IS HEREBY ORDERED that the Federal defendant's Motion for Summary Judgment be, and it hereby is, GRANTED.

Dated: 23 SEP 1977

Robert H. Schnacke
UNITED STATES DISTRICT JUDGE

* * * *

William R. BOLLOW, Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, et al., Defendants.

No. C-76-977 RHS

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

ORDER

Defendant Federal Reserve Bank of San Francisco (hereinafter, "Bank") and defendant Louis Reilly, the Bank's general counsel and vice-president, have moved for summary judgment; plaintiff Bollow moves for partial summary judgment.

Plaintiff is challenging his discharge from his job as an attorney in the Bank's law Department. Under 12 U.S.C. §341(Fifth), the Bank has the power to dismiss at pleasure employees who, like plaintiff, have been hired for no specific period of time.

Plaintiff contends that the power to discharge him is limited by California law which he contends, (a) includes a covenant of good faith and fair dealing between employers and employees; (b) provides that plaintiff's discharge was contrary to public policy; (c) mandates a hearing before plaintiff

may be discharged. However, 12 U.S.C. §341(Fifth), as a federal statute, takes precedence over state law [see U.S. Const., Art. VI, cl.2], and these California-law principles on which plaintiff relies are inapplicable to the case at bar.

While plaintiff still was employed by the Bank, the Bank's president, John Bales, stated in a letter to plaintiff that "with continued satisfactory job performance, your future with the Bank is secure." Plaintiff claims that this created a new employment contract, making it necessary that unsatisfactory performance be proved. No new contract was created because there was no new consideration in plaintiff continuing to perform services he was already bound to perform [see Levy v. Bellmar Enterprises, 241 C.A.2d 686, 689-692 (1969].

Plaintiff contends that his discharge violated the Bank's Personnel Policies Manual. That Manual does not purport to limit the Bank's right to discharge employees "at pleasure" and this Court finds that no such limitation should be implied. However, the Manual does set forth procedures to be followed when employees are purportedly discharged for certain reasons, such as misconduct, etc.

Defendant Reilly's November 3, 1975 memorandum indicated to plaintiff that the purported reason for plaintiff's discharge was the substandard nature of his behavior and attitude toward his fellow employees. The memorandum gave examples of the allegedly substandard behavior and attitude. The import of the memorandum was that if plaintiff purportedly was being discharged for a reason covered by the Manual, that reason

was misconduct. Plaintiff's discharge was in substantial compliance with the Manual's procedures for misconduct-related discharges. Those procedures were designed to ensure that the discharged employee was informed of the purported reasons for his discharge, and Reilly's aforementioned memorandum so informed plaintiff.

The Bank's failure, in discharging plaintiff, to comply with the Manual more than substantially would not make the Bank liable to plaintiff, in view of the Bank's broad power under 12 U.S.C. §341(Fifth). Plaintiff is not entitled to any relief in connection with his discharge unless the Bank's 12 U.S.C. §341(Fifth) power as to that discharge is modified by an applicable portion of the United States Constitution, federal statutory law, or the Code of Federal Regulations.

But 12 U.S.C. §341(Fifth) commits plaintiff's discharge to the Bank's discretion. Thus, the provisions in the Administrative Procedure Act (hereinafter, "APA") for judicial review of federal-agency action, do not apply to plaintiff's discharge [see 5 U.S.C. §701(a)(2)], even assuming that a federal reserve bank is a federal "agency" within the meaning of the APA. The APA's procedures for hearings do not apply to the selection or tenure of employees of federal agencies [5 U.S.C. §554(a)(2)]. The APA does require prompt notice of the denial of a written request made in connection with a federal-agency proceedings, such notice to be accompanied by a brief statement of the grounds for denial [5 U.S.C. §555(e)]. Plaintiff contends that this APA requirement was not met by the Bank, as to five written requests by plaintiff, made in connection

with his discharge. However, it does not appear that, for purposes of the APA requirement, federal-agency "proceedings" include discharges of employees of federal agencies. Thus, this Court declines to interpret 5 U.S.C. §555(e) as a modification of the Bank's power to dismiss its employees at pleasure.

The due process clauses of U.S. Const., Amends. V, XIV, bar the Federal Government and the state governments, respectively, from depriving anyone of life, liberty, or property, without due process of law. As a result of these clauses, if an employee of a government agency has a property interest in continued employment, that employee would have the right to a hearing in connection with an attempt by the agency to discharge that employee [see Davis v. Oregon State University, 591 F.2d 493, 496 (9th Cir. 1978-1979)]. However, assuming

that, for purposes of the due process clauses, a federal reserve bank is a government agency, plaintiff, in light of 12 U.S.C. §341(Fifth), lacked a property interest in continued employment.

Plaintiff contends that he had a right, under the due process clauses, to a hearing where he could undo the stigma created by his discharge, which stigma, he says, was to the effect that he was professionally incompetent. However, a stigma of professional incompetence would not give plaintiff a right to a hearing, especially since the Bank did not allege that plaintiff was discharged for professional incompetence, dishonesty, or immorality. And plaintiff's failure to obtain other employment after his discharge from the Bank does not give him a right to a hearing in connection with that discharge [see Davis v. Oregon State University, supra, at 497-498].

In sum, neither the APA nor the due process clauses of U.S.Const., Amends. V, XIV, modify the Bank's 12 U.S.C. §341 (Fifth) power as to plaintiff's discharge. Indeed, this Court finds that power modified by no applicable portion of the United States Constitution, federal statutory law, or the Code of Federal Regulations. For example, federal laws relating to age discrimination and labor unions do not apply to this case, since there is no evidence that plaintiff was discharged because of his age or because of some relationship to a labor union.

Plaintiff also contends that certain Bank employees slandered plaintiff by saying to Allen Townsend, Phillip Zachary, and others that Bollow was terminated for misconduct in his work, that this misconduct has existed for at

least three years, and that he is a troublemaker.

However, the Bank employees who allegedly made these statements have submitted declarations denying they ever made these statements. Plaintiff has submitted Townsend's declaration, but that declaration does not contend that any Bank employee made the statements that plaintiff contends were made.

All of plaintiff's claims against the Bank and Reilly are unmeritorious. Therefore, these defendants' motion for partial summary judgment is hereby granted, and plaintiff's motion for partial summary judgment is hereby denied. Plaintiff's motion to disqualify the assigned judge is totally without merit, and is denied.

In 1977, this Court granted the summary judgment motion of defendant Board of Governors of the Federal Reserve

System. The only defendants in this case who have not been mentioned yet in the present order are the Doe defendants, who are hereby dismissed from the case [see M.J. Brock & Sons, Inc. v. Davis, 401 F.Supp. 354, 357 (N.D.Cal. 1975)]. And the complaint and the action are hereby dismissed.

Dated: May 16, 1979

Robert H. Schnacke
UNITED STATES DISTRICT JUDGE

* * * *

William R. BOLLOW, Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, et al., Defendants.

No. C-76-977 RHS

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

JUDGMENT

In accordance with the accompanying order, it is hereby adjudged that the complaint and the action are dismissed.

Dated: May 16, 1979

Robert H. Schnacke
UNITED STATES DISTRICT
JUDGE

* * * *

APPENDIX C

Modified, Rehearing Denied.

William R. BOLLOW, Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, et al., Board of Governors of the Federal Reserve System, Louis E. Reilly, Does I through XX, Inclusive, Defendants-Appellees.

No. 79-4414

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ORDER, Filed Oct. 9, 1981

Before: TRASK and KENNEDY, Circuit Judges, and BONSAL,* District Judge.

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* Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

It is hereby ordered that the opinion in Bollow v. Federal Reserve Bank of San Francisco, etc. et al., No. 79-4414, July 13, 1981, is modified in the following respects:

Page 3489, column 1, line 25, of the slip opinion, insert "allegedly" following "he" preceding "shouted".

Page 3489, column 1, line 35, insert "the alleged shouting altercation" following "by" preceding "and other".

Page 3496, column 1, line 15, delete "friends" and substitute "acquaintances."

Page 3496, column 1, second line from bottom, delete "Townsend was" and substitute "Both Townsend and Zachary were."

Page 3496, column 2, line 16, preceding "Thus," insert "Finally, Townsend's declaration shows that Zachary played an active (albiet subordinate)

role in this effort to obtain Bollow's reinstatement."

Page 3496, column 2, line 19, delete "an" and substitute "parties" for "party."

* * * *

William R. BOLLOW, Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, et al., Board of Governors of the Federal Reserve System, Louis E. Reilly, Does I through XX, Inclusive, Defendants-Appellees.

No. 79-4414

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ORDER, Filed Oct. 9, 1981

Before: TRASK and KENNEDY, Circuit Judges, and BONSAL,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

* * * *

APPENDIX D

Hearing Request
(upon new evidence negating misconduct)

[CR 123, Exhibits L and K].

February 19, 1976

Mr. John J. Balles
Prsident
Federal Reserve Bank of San Francisco
400 Sansome Street
San Francisco, California 94120

Dear Sir:

As you know, it was during the course of our meeting on January 13, 1976 that I was informed that my manner of speaking to Miss Kennedy on October 28, 1975 was considered "misconduct" in your independent judgment and in the eyes of the bank. No statement which draws this conclusion had been presented to me previous to our discussion either in writing or orally. Thus, I was grateful

for your clarification and also appreciative that you said the quality of my work was not in issue.

Nonethesame, the bank later in January advised the State of California Unemployment Insurance Office of reasons for termination which reasons did not constitute "misconduct" so as to disqualify payment of unemployment benefits, i.e., "Mr. Bollow was terminated for abusive treatment and obscene language he directed towards a departmental stenographer."

Subsequently, on January 15, 1976, Miss Kennedy voluntarily wrote you that I had perhaps been rude but not so rude as to warrant dismissal, particularly since I had merely been trying to improve the quality of work requested. Her letter which questioned the bank's decision to fire me is enclosed for your reference. Miss Kennedy's views have not altered the

bank's position, however; although Miss Kennedy's stated position does reinforce my strong convicition that the incident in question was improperly characterized as "misconduct".

I have been advised by counsel that your statement declaring "misconduct" conceivably represents final governmental action in deprivation of my civil rights. Further, your statement is interpreted by me as a disclaimer of any obligation to pay severance regardless of these other issues. Moreover, it would be ill-advised from my standpoint to fail at this time to nail some of these matters down, lest I forego rights which I should preserve.

Accordingly, I respectfully demand a full adversary hearing before a Board hearing examiner pursuant to Administrative Procedure Act standards or; alternatively, a statement on behalf of the

System that I have exhausted all administrative remedies and that I am not entitled to such a hearing or further consideration of the issues raised.

As to the severance pay issue, it is my position that I am entitled to some $11,500 representing two weeks pay for each of eleven years of dedicated service. As a separate demand in addition to my demand for a hearing, I respectfully request payment of this severance.

Yours very truly,
William R. Bollow

Enclosure
cc: Board of Governors of the Federal Reserve System
Office of the General Counsel

* * * *

January 15, 1976

MEMORANDUM TO: Mr. John J. Balles

FROM: Ms. Linda Kennedy

SUBJECT: Termination of employment of Mr. William R. Bollow.

On January 13, 1976, as I left the waiting area in the lobby of the bank, I accosted Mr. William R. Bollow. It is with an ill feeling that I entertain the thought of the remotest possibility that his termination was, in whole or in part, based on the misunderstanding between the two of us which took place on or about October 28, 1975.

Mr. Bollow is a man of many thoughts, ideas, and concerns which in this instance, caused him to act unthinkingly. Yes, I stated and will again state that he was rude in his manner of requesting my assistance. However, I will also state that what he was demanding was efficiency, timeliness, and my undivided attention in a matter which he thought to be important. The only reason I could not respond as such was because I was the only secretary in the Department at the time and there are three and sometimes

four other attorneys to assist along with taking care of my duties as well as the duties of the absent secretary; all these things demanded my attention during this particular week.

Spats are not of the unusual in any place of business and they are sometimes very effective in bringing about a change or improvement. Mr. Bollow has spoken rather harshly to me before but what he was asking for is what the bank itself is striving to achieve, namely, productivity at an expeditious and efficient level.

There is no existing animosity between Mr. Bollow and myself as a result of this misunderstanding. I felt more at ease working and speaking with Mr. Bollow than the other attorneys and at all times we exercised this comfort of speaking with each other.

Mr. Bollow, in my opinion, is a good man and has much to offer any employer.

He is easy-going, cheerful, and unlike many others, he is one to inform you whether you have or have not done well on an assignment.

Of course, you have the biggest responsibility, making the decisions. The purpose of this letter is only to give you an idea of my feelings toward the situation, which, conclusively, is that if the referenced misunderstanding was essential in his termination, it was incorrectly categorized for such incidents sometimes, as with this instance, makes one more aware of different ways to handle a sticky situation without unnecessary difficulties.

Thank you for your time and patience in reading this letter.

Sincerely,
Linda M. Kennedy

* * * *

APPENDIX E

"Confidential" Ombudsman's Findings

[CR 120, Langhorne Declaration, Exhibit A].

CONFIDENTIAL internal communication

TO: Mr. Balles

SUBJECT: William R. Bollow

FROM: Mrs.Langhorne

Date: December 16, 1976

I have completed a review of the materials available concerning Mr. Bollow's employment at the Bank, the request for his resignation, and the various memoranda in response to this request. The particulars of the case are will documented, and I find that the termination of this employee was implemented fairly and within the established personnel policy of the Bank.

Mr. Bollow's termination falls under Section 9.1.III.C. of the policy, "Where

termination is recommended because of dishonesty, misconduct or insubordination..." Although a "Personnel Notice" was not completed as indicated in the policy, Mr. Reilly's handwritten memorandum of October 29 serves this same purpose, especially as supported by his November 9 memorandum. In Mr. Bollow's rebuttal, there does not appear to be a decisive response to the evaluation that his behavior and attitude toward his associates was a barrier to maintaining a harmonious working relationship within the department. In absence of this, I must remain of the opinion that the dismissal was justified.

The recommendation by Mr. Reilly of two months' severance pay is actually more generous than the policy stipulates. Section 9.1.IV.A., under involuntary termination for reason of dishonesty,

misconduct, insubordination, suggests that no separation pay be paid.

Jane Langhorne

* * * *

APPENDIX F

Sims Declaration on Slander

[CR 120, Exhibit A].

CONFIDENTIAL MEMORANDUM TO The Files

FROM KENT SIMS

SUBJECT William Bollow: Memorandum of Conversation with Mr. Alan Townsend

About a week ago Mr. Alan Townsend (Senior Vice President and Cashier of the Community National Bank, Bakersfield, and Treasurer of Pacific Bancorporation, Bakersfield) phoned Mr. Balles to request an appointment to discuss "one of the officers of this Bank." Mr. Balles' secretary, Ms. Scott, took the call as Mr. Balles was away from the Bank at that time. In subsequent discussion with Mr. Balles, it was decided that should Mr. Townsend call again he would be referred either to Mr. Kelly or to Mr. Sims,

depending upon the officer he wished to discuss. Mr. Townsend called Mr. Balles' office on Monday, November 10, and was referred to Mr. Sims. Upon establishing that "the officer" which Mr. Townsend wished to discuss was Mr. William Bollow of the Bank's Law Department, Mr. Sims made an appointment to see Mr. Townsend at 10:00 a.m. on Tuesday, November 11.

Mr. Townsend began our discussion by stating that he had had a long association with Mr. Bollow through the inquiries of his bank and bank holding company regarding various laws and regulations governing the activities of these institutions. He also stated that a strong personal friendship had developed between him and Mr. Bollow and indicated that the purpose of his visit was to intercede on Mr. Bollow's behalf in what he understood was the Bank's decision to terminate Mr. Bollow's

employment. Mr. Townsend stated that he believed Mr. Bollow to be a very bright and hard-working individual and that he had been a very great help to Mr. Townsend in all of his dealings with the Federal Reserve Bank of San Francisco. He noted that Mr. Bollow occasionally displayed "erratic behavior", tended to be "hot headed", but that he always seemed to cool down and do a good job. Mr. Townsend further stated that he was making this visit on behalf of Mr. Bollow for three reasons: 1) that he valued Mr. Bollow's services as a person to whom he could go for information and advice regarding bank holding company activities; 2) he felt that a termination of Mr. Bollow's employment at this time would severely damage his reputation; and 3) he had information regarding Mr. Bollow's personal finances that suggested termination at this time could be quite

damaging to Mr. Bollow's personal financial position. Townsend went on to say that from Mr. Bollow he had learned that there was a personal rivalry between Mr. Bollow and Mr. Reilly, the Bank's General Counsel, and that he had been led to believe that this may have been part of the basis for Mr. Reilly's decision to terminate Mr. Bollow's services.

I listened to Mr. Townsend's remarks along the lines described above for the better part of a half-hour, then indicated to him that I was not at liberty to discuss the details of the personnel action which Mr. Bollow had apparently disclosed himself to Mr. Townsend. I did, however, indicate that it was not the Bank's intention to damage Mr. Bollow's reputation or to unduly inconvenience him financially. However, I did confirm what Mr. Bollow had already told Mr. Townsend, namely that Mr. Bollow had

been given the opportunity to resign from this Bank and had been told that if he did not tender his resignation by close of business on Thursday, November 13, his employment would be terminated. I further indicated that I have the utmost respect for Mr. Bollow's native ability and knowledge of legal matters concerning the activities, laws and regulations related to bank holding companies. However, the personnel action which Mr. Bollow had disclosed to Mr. Townsend had been taken in what I believe to be the best interest of the Bank and the Federal Reserve Systlem; that I had discussed these matters at length with Mr. Bollow myself, giving him every opportunity to explain "his side of the story" and that this discussion had turned up nothing which would cause me to reverse the decision made by Mr. Bollow's immediate supervisor, Mr. Reilly.

Mr. Townsend then indicated that he thought Mr. Bollow had been doing an exceptionally good job for the Bank in what he believed was a standard salary in the FederalReserve System, but one that was not commensurate with the compensation he would be receiving in the private sector of the economy. I observed to Mr. Townsend that none of the officials who work for the Bank, beginning with the Bank's President, worked for this institution primarily for the compensation, and that each of them likely would command a considerably higher salary in the private market place. I further observed that the rewards for working for the FederalReserve Bank came from a sense of public service and faithfully keeping the public trust vested in this institution, rather than from strictly salary considerations. Mr. Townsend countered by inquiry whether the Bank had

considered Mr. Bollow's proposal that he be retained as a private consultant to assist the Law Department and the Bank Holding Company Section of the Supervision, Regulation and Credit Department after he ceased to be a full-time employee of the Bank. Townsend also indicated at this time that he did not believe that Mr. Bollow, in fact, wished to pursue a legal action against the Bank, but that he felt compelled to do so to protect his own interests. I observed to Mr. Townsend that in the discharge of my duties as Senior Vice President in charge of the District Departments, I attempt to be fair and equitable to all of the employees under my direct or indirect supervision to the best of my abilities, but that my primary obligation is to the public trust held by the Federal Reserve Bank. I further observed Mr. Bollow had stated to me personally

his intention to pursue legal action against the Bank because of his pending termination and that he had implied the same in writing. I also observed that I had no reason to doubt Mr. Bollow's word and that being the case, it would not seem reasonable for the Federal Reserve Bank to consider retaining Mr. Bollow's services as a consultant.

At this point Mr. Townsend indicated that Pacific Bancorporation of Bakersfield was considering retaining Mr. Bollow's services as a consultant if he left the employment of the Bank. Townsend further indicated that one consideration in this action was his personal friendship with Mr. Bollow and his desire to assist Mr. Bollow financially. According to Townsend, Mr. Bollow recently has contracted for a "quarter of a million dollar asset", the acquisition of which would be jeopardized if he did not

obtain employment. I indicated that Mr. Bollow's personal finances were his own affair, but that I wished him well in obtaining whatever employment was available to him outside the Bank and that certainly the Bank would have no prejudice against either Mr. Bollow or any employer who chose to retain his services.

Mr. Townsend then restated much of what has been summarized above again. I responded that the Bank was acting in what it considered to be the best interest of this institution and the public trust it holds and that I had learned nothing to date, including the present conversation, which would cause me to recommend that the Bank reconsider its decision regarding Mr. Bollow. Our conservation ended on an amicable note, but I assume that the contents thereof will be reported in detail to Mr. Bollow.

Comment: Mr. Bollow's action in discussing the internal policies and actions of this Reserve Bank with the officers of an institution which this Bank regulates while still an employee of the Bank seems to this writer to be highly irregular. In my view, Mr. Bollow's apparent decision to go to these regulated institutions in an attempt to bring pressure to bear upon the management of this Reserve Bank to reverse its decision to terminate his employment for cause is inexcusable and should not be tolerated.

Kent O. Sims

* * * *

APPENDIX G

Townsend Declaration on Slander

[CR 136]

I, Allan R. Townsend, declare:

1. I am presently a certified public accountant practicing that profession in Bakersfield, California. The following facts are within my personal knowledge and, if called as a witness, I can competently testify with respect thereto.

2. On, or around, November 11, 1975, I met with Kent O. Sims, Senior Vice President of the Federal Reserve Bank of San Francisco, for approximately one hour, to discuss the termination of William R. Bollow. Phillip Zachary was with me.

3. At that time, I was Vice President and Treasurer of Pacific Bancorporation, the bank holding company parent of

Community National Bank of Bakersfield, California.

4. I had come to San Francisco with Mr. Zachary, Executive Vice President of Community National, to discuss a bank supervisory question with Mr. John Hensel, Regional Comptroller of the Currency. We both signed a register at the Federal Reserve Bank prior to the visit there with Sims.

5. I made the decision to talk with the Federal Reserve about Bollow's termination, to see if I might possibly intercede in his behalf, because I valued his friendship. Also, I sought to make sure the FED wasn't acting hastily to hurt Mr. Bollow in his career and reputation; also because his abrupt firing might severely injure him financially in view of his recent real estate investments. I came also on behalf of my company and the bank holding company

industry. I wanted Bollow to continue in his speciality as an expert on bank holding company law.

6. I could hire Bollow for my holding company and I was considering that alternative. Mr. Zachary, of course, had only peripheral interest in the matter, at best, since he worked for Community National Bank and not for its holding company parent.

7. Mr. Bollow didn't know of my intended visit until the preceding evening when Mr. Zachary and I stopped by his house in San Francisco. He had not asked me to interecede in his behalf. He did telephone me to let me know he was being terminated early in November.

8. Sims said Bollow's behavior was:

> "non-standard;" "abnormal behavior;" "unacceptable and unprofessional behavior."

9. I never said to Sims, in any context, that Bollow was "hot headed" or "erratic," as I understand he reported later.

10. Sims never said it was wrong for Bollow to have informed me that he had been fired, nor did he say Bollow breached Federal Reserve ethics in talking to me about this, or anything else.

11. Sims said the bank had an extensive file which led up to and justified Bollow's termination. He left the impression that the bank had an open and shut, well-documented case.

12. He did not give any facts, substantive reasons, or analysis, nor did he specifically indicate he was familar with the facts to justify Bollow's firing -- simply that there were "reasons, several reasons." He was very "evasive" on this point.

13. I said Bollow might have a law suit, but I didn't think he wanted to bring it. Sims said:

> "As long as Bollow is considering suing, we are not interested in re-considering."

14. Sims said Bollow would have been fired long ago if it hadn't been for the efforts of Louis E. Reilly on Bollow's behalf. Sims said that he (Sims) had actually prevented Bollow's termination twice before. Sims said:

> "On at least two occasions, Balles had ordered termination and I saved Bollow's neck."

15. I said, "I thought it was the other way around, that there were long-standing differences between Bollow and Reilly." Sims said:

> "That's interesting, but not the opinion widely held here. Only you and Bollow think that."

16. Sims indicated the matter was unlikely to be reversed. He seemed

closed-minded on this point, and I left with the impression that the reasons for firing Bollow were serious and sinister ones.

17. I remember saying, "Bill is an extremely talented, highly professional person, and has made a tremendous public contribution in counseling my company and others throughout the bank holding company industry."

18. I left the meeting with the impression that Mr. Bollow was terminated for misconduct in his work. This misconduct has existed for at least three years. He is a troublemaker. These words certainly convey the impression left with me.

19. Mr. Zachary said to me after the meeting:

"Something's wrong here."

He said that he felt we were being left out in the cold as to the reasons for

firing Bollow. I still feel that way.

20. I left the meeting with the impression that an injustice was being done, that the Federal Reserve's decision didn't make sense.

21. The foregoing is to the best of my recollection.

I declare, under penalty of perjury, that the foregoing is true and correct.

EXECUTED this 11th day of October, 1978, at Bakersfield, California.

Allan R.Townsend

* * * *

APPENDIX H

Letters Regarding Harmful Internal Censure Affecting Law Clients

[CR 123, Exhibit P].

Sunday April 11, 1976

Mr. Kent Sims
Senior Vice President
Federal Reserve Bank of San Francisco
400 Sansome St.
San Francisco, California 94120

Dear Mr. Sims:

You advised me on Friday that you would attempt to determine whether I might be permitted to use the facilities of the Research Department library of the Federal Reserve Bank of San Francisco. Hopefully, this "courtesy" will be extended to me to the same extent it is commonly extended to all financial consultants, attorneys, and others.

I was surprized to arrive there only to learn that the guards had specific orders that William R. Bollow could only

be admitted to socalled public areas which were defined as excluding the library. Never before have I heard of anyone being denied use of this facility, perhaps the best of its kind in town.

You explained that Mr. Balles, President of the bank, had given this order. You offered to take the matter up with him Monday morning, upon my written request, since he was in Oregon. Only Mr. Balles could interpret his own instructions restricting my presence "as long as I was in an adverse" posture vis-a-vis the bank.

I replied that I had legitimate intentions to press my own personal claims and to take them to court perhaps. However, such intentions should not affect the customary privilege of access. My claims, as you know, arose last year and were not the reason for my request to use the library. The bank may wish to

hide from me or it may fear even my quiet presence. Possibly the sight of me arouses dissent because people there feel I was mistreated. But the Federal Reserve Bank is too public a place to merit acting so defensively. I think this position quite correct because the Federal Reserve Bank as a creature of Congress can only properly favor the public interest. I refuse to believe that the public interest is harmed by such harmless "invasion" of the bank's premises.

Both you and Mr. Balles understand, of course, that this action adversely reflects upon my ability to earn a livelihood. And, I think it fortunate that I was not accompanied by a client when I arrived at the bank on Friday

since the embarassment would have been magnitudinous.

This matter needs the attention of Mr. Balles, if--as you say--only he made the order and only he can clarify it. I need to know what I can and cannot do, as distinguished from other members of the various classes of persons to whom the bank commonly renders services and opens its door. Again, I am particularly concerned with respect to my ability to represent clients and practice law, thereby.

The Fed. was set up by Congress not to do private favors but to render impartial decisions and service. Thus, it makes little difference whether one is friend or foe--at least, in the eyes of the law. But, since we are on that subject, I would like to be reassured in writing that both myself and client, anyone with legitimate interests, would

be accorded fair and equal treatment by Fed. If this is not the case, I might as well resign from my earnest efforts to represent those who have matters to process with you since I have no right, as attorney, to prejudice their chances of success.

Early response to this letter may be important to me. Accordingly, I recommend delegation of such issues. Persons such as yourself ought to be in a position to make decisions in matters seemingly so trivial from your point of view. Formerly, having even less authority within the government bureaucracy, I was often reminded how needlessly cumbersome it was. And, I managed to uncomplicate matters, if I could. I must say that the weight of it all seems even more crushing to me now as I struggle to survive in the "real" world. So, please, let's stop this

nonesense. I have useful work to do and I should not have to request the courtesy in question, although I do not mean to seem impolite by saying so.

Very truly yours,
William R. Bollow

* * * *

April 14, 1976

Mr. William R. Bollow
600 Presidio Avenue
San Francisco, California 94115

Dear Mr. Bollow:

The Research Library of the Federal Reserve Bank of San Francisco is available for use by persons other than the Bank staff within the discretion of the Bank and only on an occasional basis. In the exercise of its discretion, the Bank has attempted to make available its library facilities when and if a person not on its staff manifests a need for library materials unique to the Bank's

library and which local public libraries are unwilling to obtain from the Bank on inter-library loans. Such discretionary use of the Bank's library by others is furhter [sic] conditioned, of course, upon other factors such as internal Bank needs for the materials, availability of supervisorial personnel, etc. If you have a specific need for any library material which you are unable to obtain from any other source, you should contact our Librarian, Ms. Waggoner, who will process your request.

If there is some way that we may be of further assistance, please advise.

Sincerely yours,
Kent O. Sims
Senior Vice President
District Departments

* * * *

Opposition

Office - Supreme Court, U.S.
FILED
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No. 81-1224

In the Supreme Court of the United States

WILLIAM R. BOLLOW,

Petitioner,

vs.

FEDERAL RESERVE BANK OF SAN FRANCISCO, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, LOUIS E. REILLY,

Respondents.

Brief of Respondents Federal Reserve Bank of San Francisco and Louis E. Reilly In Opposition

DONALD D. CONNORS, JR.
JAMES L. MEEDER
Attorneys for Respondents Federal Reserve Bank of San Francisco and Louis E. Reilly

Of Counsel:

BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, California 94105
(415) 442-0900

SORG PRINTING COMPANY OF CALIFORNIA, 340 FIRST STREET, SAN FRANCISCO 94105

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Brief of Respondents Federal Reserve Bank of San Francisco and Louis E. Reilly In Opposition

STATEMENT OF THE CASE

On October 28, 1975, Petitioner William R. Bollow, then an attorney employed in the Law Department of Respondent Federal Reserve Bank of San Francisco ("Bank"), was heard by his immediate supervisor, Respondent Louis E. Reilly, Vice President and General Counsel to the Bank, shouting at Linda Kennedy, a secretary. Petitioner's language was abusive and contained profanity. As Reilly approached petitioner and Kennedy, petitioner shouted, "I want her ass out of here." (C.R. 120, Reilly Declaration, ¶ 4.)[1]

1. "C.R. ....." refers to the Clerk's Record which was before the Ninth Circuit.

The following day, October 29, 1975, Reilly advised petitioner that his behavior of the previous day would not be tolerated and thus his resignation was requested. Bollow refused to tender his resignation; he was then informed that he would be terminated. (C.R. 120, Reilly Declaration, ¶¶ 4 and 5.) A memorandum written by Reilly described the incident:

> "The action taken by me today was precipitated by an incident which occurred yesterday in the Law Department. Upon my return from lunch, I heard Mr. Bollow shouting at Linda Kennedy, our stenographer. His language was sprinkled with profanity, e.g., 'goddamit, Linda . . .' When I appeared in his office he was holding the telephone receiver in his hand—I could not determine if the line was 'live' or not. At this moment, he shouted to me something like 'I want her ass out of here.' Linda and I walked away at this point. She stated that she did not have to take that—and I agreed. Mr. Bollow apparently left the department shortly thereafter and so far as I know did not return that afternoon."

(C.R. 120, Exhibit B to Reilly Declaration.)

The incident which precipitated petitioner's termination was merely the culmination of several months of unacceptable behavior on the part of petitioner.

On June 30, 1975, petitioner had sent John J. Balles, President of the Bank, an unsolicited interoffice memorandum entitled:

> "To God Almighty
> Subject: Weirdo thoughts after reflecting on letter concerning membership in reserve requirements and the profound sense of emptiness which remained after having written it, yet really not, seeing as it must have been set up that way."

(C.R. 120, Exhibit A to Balles Declaration.) The memorandum was as unintelligible as its heading.

In September, 1975, Reilly had instructed Enid Varney, a secretary in the Law Department, to call petitioner, who was on

vacation at home, and ask him to submit a statement of expenses covering a business trip he had recently taken. Varney called petitioner and explained that the statement of expenses was necessary because the Federal Reserve Board examiners were at the Bank and they might need the statement. Petitioner replied to Varney's request as follows: "No little turd from the Board can tell me what to do." He further stated to Varney that she could tell them what he had said. Varney reported this incident to Reilly. (C.R. 120, Exhibit C, Reilly Declaration, ¶ 6(b).)

In mid-October, 1975, there had been a shouting incident between petitioner and Varney; petitioner had apparently become annoyed by the fact that Varney was unable to type a personal letter of his, inasmuch as she was doing Bank work for Reilly at the time. Varney complained of this to Reilly. (C.R. 120, Exhibit C, Reilly Declaration, ¶ 6(a).)

Each of these undisputed incidents, along with several others which petitioner either does not remember or denies, was set out in the four-page memorandum written on November 9, 1975 by Reilly stating the reasons for petitioner's discharge. At the end of that memorandum Reilly concluded:

> ". . . it seemed clear to me that Mr. Bollow's behavior and attitude toward his associates had become a serious barrier to maintaining a harmonious working relationship within the department. While not entirely typical, his run-in with Ms. Kennedy was the culmination of other unpleasant incidents and indicated that matters of this kind would get worse before they improved. As communication with him had nearly reached the breaking point, there seemed little hope that renewed efforts to solicit his cooperation would succeed. Absent a unified effort, the chances for achieving the department's goals and objectives were substantially reduced. Mr. Bollow, on the other hand, seemingly saw the performance of the duties of his position as being independent of any such considerations."

(C.R. 120, p. 4 of Exhibit C to Reilly Declaration.)

At the time of petitioner's termination, Section 9.1.III of the Bank's personnel policies manual provided in pertinent part that:

> "Where termination is recommended because of dishonesty, misconduct or insubordination, the following steps should be taken: 1. The supervisor should complete a "Personnel Notice" and discuss the situation with the employee. The form should be signed by the department head and by the senior officer supervising the function, and then forwarded to the Branch Personnel Department. 2. The Branch Personnel Department will arrange for a final exit interview. 3. Employees involuntarily terminated for these reasons may appeal their case to the Ombudsman or Corporate Officer for review."

(C.R. 120, Exhibit F to Reilly Declaration.)

On October 29, 1975, the day petitioner was informed of his discharge, Reilly sent a memorandum to Kent Sims, Senior Vice President in Charge of District Affairs, and Walt Woodbury, Vice President of Corporate Personnel, describing the October 28, 1975 incident. (C.R. 120, Exhibit B to Reilly Declaration.)

Sims reviewed and confirmed Reilly's decision to terminate petitioner. (C.R. 120, Sims Declaration, ¶ 2.) Shortly thereafter, Sims met with petitioner to discuss his termination. Sims informed petitioner that he would be given until November 12, 1975 to elect to resign and that he was to receive two months' severance pay. (C.R. 120, Sims Declaration, ¶ 4.)

In early November, Michael J. Murray, the Personnel Officer of the Bank, conducted a final exit interview with Petitioner, during which the terms of his separation were discussed. (C.R. 120, Murray Declaration, ¶ 2.) And, on November 9, 1975 Reilly prepared a four page memorandum explaining the reasons for petitioner's discharge. A copy of this memorandum was given to petitioner.

On November 25, 1975, petitioner submitted an eleven page memorandum to John J. Balles, President of the Bank, responding to respondent Reilly's November 9, 1975 memorandum. (C.R. 120, Exhibit G to Reilly Declaration.)

Shortly thereafter, Jane Langhorne, Ombudsman of the Bank, independently reviewed the various memoranda regarding petitioner's termination and on December 15, 1975, informed Balles that she found petitioner's termination to have been "implemented fairly and within the established personnel policy of the Bank." (C.R. 120, Langhorne Declaration, Exhibit A.)

On January 13, 1976, Balles and Murray met with petitioner at his request to review his termination. The meeting lasted approximately one hour. Balles affirmed the decision to terminate petitioner and informed him that his conduct had been totally unacceptable. (C.R. 120, Balles Declaration, ¶ 4.)

The United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals also have affirmed the Bank's decision to terminate petitioner. The Ninth Circuit's opinion is reported at 650 F.2d 1093.

REASONS FOR DENYING THE WRIT

A. The Petition Does Not Raise an Important Unresolved Federal Question.

Petitioner asserts, without citation to any relevant authority, that Section Four Fifth of the Federal Reserve Act of 1913 ("the Act")[2] and Article VI, Clause 2 of the Constitution of the

2. The statute governing the employment relationship between petitioner and the Bank, § Four Fifth of the Federal Reserve Act of 1913, 12 U.S.C. Section 341 (Fifth) provides in pertinent part that:

> "[A] Federal reserve bank . . . shall have power . . . Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers and employees.*" (Emphasis added).

United States[3] should be ignored and the "process rights of reserve bank employees must be determined by reference to State law." It is this issue which petitioner claims is unresolved and needs the attention of this Court.

In rejecting this argument, the Ninth Circuit held, 650 F.2d at 1098, that any attempt to create process or tenure rights by

> ". . . reference to independent sources are violative of the statute and void thereunder. Assuming that Bollow would indeed have been entitled to certain process rights under California law, such law when applied to reserve bank employees conflicts with section Four, Fifth. In such circumstances, the federal statute must control. U.S. Const., Art. VI, cl. 2."

The Ninth Circuit has simply confirmed the obvious: the plain, clear language of the Supremacy Clause means what it says. As Chief Justice Marshall wrote more than a century ago in *McCulloch v. Maryland,* 4 Wheat 316, 436 (1819):

> ". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."

In short, the question whether some unidentified "state law . . . can *inhibit* . . . Federal Reserve Bank terminations . . ." (Petition, p. 12) is not an unresolved Federal question which warrants the attention of this Court.[4]

---

3. Article VI, Clause 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. The law of the State of California has long recognized the preemptive nature of federal "dismissal at pleasure" statutes. *Cox v. First National Bank,* 10 Cal.App.2d 302, 305 (1935); *Kozlowsky v. Westminster National Bank,* 6 Cal.App.3d 593, 596 (1970).

B. The Decision Below Is Not in Conflict With Ashton v. Civiletti or Young v. United States; Indeed, Courts Have Uniformly Held That One Who Works "At the Pleasure" of Another Has No Constitutionally Protected Entitlement to Continued Employment.

Petitioner has asserted that the Ninth Circuit's holding that Section Four Fifth of the Act precludes the Bank from creating any property right in employment is in conflict with *Ashton v. Civiletti,* 613 F.2d 923, 929 (D.C. Cir. 1979), and *Young v. United States,* 498 F.2d 1211, 1218-22 (5th Cir. 1974), both of which held that a federal agency could create a property interest in employment such that the employee could be fired only under the procedural protections of the due process clause.

The Ninth Circuit's decision below is not in conflict with these two cases for one very simple reason: no federal statute providing for discharge "at pleasure" controlled the employment relationship in *Young* and *Ashton.* Indeed, the Fifth Circuit has squarely held, in a decision subsequent to *Young,* that a federal statute which expressly provides that employees may be dismissed "at pleasure" renders void all regulations or contracts purporting to limit that authority. *Sims v. Fox,* 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied,* 421 U.S. 1011 (1975).

Moreover, as the Ninth Circuit pointed out below, 650 F.2d at 1100 n. 6, the cases have uniformly held that one who works "at the pleasure" of another has no constitutionally protected entitlement to employment. See, e.g., *Arnett v. Kennedy,* 416 U.S. 134, 181-82, (1974) (White, J., concurring and dissenting), and cases discussed therein; *Bishop v. Wood,* 426 U.S. 341, 345, 347, (1976); *Mervin v. F.T.C.,* 591 F.2d 821, 828 (D.C. Cir. 1978); *Moore v Otero,* 557 F.2d 435, 437 (5th Cir. 1977); *Ampleman v. Schlesinger,* 534 F.2d 825, 828 (8th Cir. 1976); *Sims v. Fox, supra,* 505 F.2d at 861-62; *Field v. Boyle,* 503 F.2d 774, 777-78 (7th Cir. 1974); *Catterson v. Caso,* 472 F.Supp. 833, 838 (E.D.N.Y. 1979); see *Mazalaski v. Treusdell,* 562 F.2d 701, 709 n. 23 (D.C. Cir. 1977).

C. The Decision Below Is Not in Conflict With Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

Petitioner now asserts for the first time claims of "estoppel" and "nonretroactivity".[5] As best we understand those assertions in the context of the present petition for certiorari, it is that the Ninth Circuit's decision is somehow inconsistent with *Chevron Oil Co. v. Huson,* 404 U.S. 98 (1971). Apparently, petitioner would have this Court affirm that portion of the decision of the Ninth Circuit which held that he could be dismissed at pleasure and then not apply it to him "retroactively". *Chevron Oil* is simply not applicable here.[6]

In *Chevron Oil* this Court found that the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("Lands Act"), requires that state statutes of limitations be applied to actions for personal injury occurring on fixtures on the Outer Continental Shelf. Resolution of this issue was controlled by this Court's earlier interpretation of the Lands Act in *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969). The Court further found in *Chevron Oil* that, because of the unique circumstances of the case, the state limitation period would not be applied retroactively to bar respondent's action.

The respondent in *Chevron Oil* had been injured off the coast of Louisiana three years before the Court's decision in *Rodrigue.* He had filed his lawsuit more than one year before *Rodrigue.* Yet, if the Louisiana statute of limitations controlled the case, his action would have been time barred more than two years before *Rodrigue.* In holding that the Louisiana one-year limitations period should not be applied retroactively to respondent, the Court explained that

---

5. Although petitioner filed a Petition for Rehearing below, that petition did not address the issues of "estoppel" and "nonretroactivity".

6. Petitioner's "estoppel" argument has not identified a single case in conflict with the Ninth Circuit's decision below.

> "*Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, *e.g.*, *Pure Oil Co. v. Snipes*, 293 F.2d 60; *Movible Offshore Co. v. Ousley*, 346 F.2d 870; *Loffland Bros. Co. v. Roberts*, 386 F.2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was."

Id. at 107.

Here, of course, we are not dealing with a case of first impression, or the overruling of a long line of decisions by the court below; nor have we been presented with facts as unique as those in *Chevron Oil*.

D. The Decision Below Was Correctly Decided.

The remaining three "reasons" for granting the writ presented in the petition (pp. 26-36) are nothing more than rearguments of several issues in the case which were all squarely and properly resolved by the Ninth Circuit. 650 F.2d at 1101-1103. It is unnecessary to restate the opinion of the Ninth Circuit on these issues or attempt to improve upon it.

CONCLUSION

The record of this case clearly establishes that petitioner was an unsatisfactory employee. All of the internal officers of the Bank who reviewed the decision to dismiss petitioner confirmed that fact. The District Court confirmed the appropriateness of the decision and held that the Bank had complied with its published personnel manual for discharging employees for miscon-

duct. The Ninth Circuit in a thoughtful and well-reasoned decision has affirmed the judgment of the District Court.

We urge that the Petition be denied.

January 29, 1982

Respectfully submitted,

DONALD D. CONNORS, JR.
JAMES L. MEEDER

Attorney for Respondents Federal Reserve Bank of San Francisco and Louis E. Reilly

Of Counsel:

BROBECK, PHLEGER & HARRISON

Spear Street Tower
One Market Plaza
San Francisco, California 94105
(415) 442-0900